Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

LAWRENCE L. BINKLEY,

Petitioner,

v.

CITY OF LONG BEACH, a municipal corporation, and JAMES C. HANKLA, City Manager of the City of Long Beach,

Respondents.

Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District, Division Two

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a name-clearing hearing at which the accused Chief of Police of the City of Long Beach has no right to confront and cross-examine his accusers; no right to present independent evidence; which is presided over by an individual appointed by the Chief's primary accuser; where that same primary accuser retains the ultimate authority to determine the truth of the charges; and where the Chief has the burden of disproving those charges, comport with the Chief's due process right to have an opportunity to clear his name?

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA SECOND APPELLATE DISTRICT

Petitioner Lawrence L. Binkley respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal entered in the above entitled proceeding on July 8, 1993.

OPINION AND ORDERS BELOW

The July 8, 1993, opinion of the California Court of Appeal was certified for publication by that court. It is reproduced in the appendix hereto, App. 1a-21a. The October 22, 1993, order of the Supreme Court of California denying Binkley's petition for review is unreported and reproduced at App. 27a.

JURISDICTION

The July 8, 1993, decision of the California Court of Appeal rejected Chief Binkley's federal constitutional challenge to the procedure employed in terminating Chief Binkley from his position as Chief of Police for the City of Long Beach, California. The challenge had been raised in the trial court. It was renewed in Binkley's briefs before the Court of Appeal. See App. 14a-21a. Finally, it was presented to the California Supreme Court in a petition for review. App. 22a-26a. On October 22, 1993, the California Supreme Court declined to review the challenge to the Court of Appeal's determination that the

process afforded Binkley did not violate the Federal Constitution. App. 27a. The question presented is within this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution Provides: "[N]or shall any state derive any person of life, liberty or property without due process of law."

STATEMENT OF THE CASE

This case concerns the termination of Lawrence L. Binkley as Chief of Police for the City of Long Beach, California. Chief Binkley was hired in March 1987 and was given the task of "reforming and restoring public confidence in the City's police department, which had acquired a reputation for providing inadequate training, and exercising insufficient control and discipline over its officers." App. 3a.

In early October 1991, Long Beach City Attorney John Calhoun threatened to " 'have [Chief Binkley's] job,' in part, because [Chief Binkley] had not spoken with [Mr. Calhoun] for more than 10 months." App. 4a. When Chief Binkley attempted to arrange a meeting to discuss the matter, he was told that "it would be 'fruitless' to meet with Calhoun at that time." App. 4a.

On December 19, 1991, Long Beach City Manager James C. Hankla asked Chief Binkley to announce his own retirement allegedly because of complaints made by police department commanders as to the " 'element of fear' " in Chief Binkley's operation of the department. App. 4a. On December 23, 1991, Mr. Hankla informed Chief Binkley that he had undertaken a full review of Chief Binkley's performance and that effective immediately Chief Binkley was being reassigned from his current position " 'to a special assignment under [Hankla's] direction at a location to be determined.' " App. 4a.

By letter dated January 10, 1992, Assistant City Attorney Shannon advised Chief Binkley of a hearing concerning the charges against him. The letter stated, in relevant part:

> "This meeting is not a *Skelly [v. State Personnel Bd.*, 15 Cal.3d 194 (1975)] hearing, nor is the Chief entitled to such a hearing. However, he will be given an opportunity to respond to the allegations set forth in the attached document. As we have previously indicated, the investigation of these allegations forms a part of the total performance review of your client. Chief Binkley will further have an opportunity to discuss the more general allegations that his management policies and practices have contributed to the destruction of morale in the Police Department in general and his Command staff in particular." App. 5a.

As summarized by the Court of Appeal, attached to the January 10th letter was a list of the following allegations of misconduct by Chief Binkley:

"(1) Initiation of sub-rosa investigations on an elected Long Beach public official without authorization or notification to the city manager;

"(2) Unauthorized hiring of and payment to retired police officers as undercover agents to investigate a Long Beach public official;

"(3) Encouragement of command officers to file stress-related pension claims;

"(4) Accusing the city manager of wrongful action in a personnel matter, i.e., that he reduced the proposed discipline of Officer J. Ponce because of a personal/business relationship, and making disparaging statements regarding the city manager's continuing employment of Officer Ponce;

"(5) Directing subordinates not to communicate with the director of human resources in a matter in which such communication was necessary to ensure adherence to City policy;

"(6) Directing subordinates not to seek the advice of the city attorney, or to ignore advice after it was given, regarding matters in which adherence to the legal advice of that office was necessary and appropriate;

"(7) Unauthorized use of a police helicopter to transport respondent to a social function while he was off duty." App. 5a-6a.

On January 13, 1992, Chief Binkley met with Mr. Hankla, Assistant City Attorney Shannon, and an investigator. On January 17, 1992, Chief Binkley was advised that "following a full review of [Chief Binkley's] performance as chief of police, Hankla was 'satisfied that there

is not sufficient evidence to conclude that you have engaged in any act of wrongdoing.' The letter further stated: 'However, I have, in the course of this review, discovered instances in which you have exercised questionable judgment. Further, a substantial number of your command staff have come forward to criticize your leadership, and you have, by your actions, subjected yourself to criticism from City management. As a consequence, I have lost confidence in your ability to lead the Long Beach Police Department. I am, therefore, removing you from the position of Chief of Police.' " App. 6a-7a.

On February 14, 1992, Hankla sent a letter acknowledging that Chief Binkley had requested an appeal hearing. The letter identified Dr. Judson Shoendorf as the person selected by Hankla to conduct the scheduled appeal hearing, and included a summary of the six findings, and the supporting evidence upon which Hankla's decision to review Chief Binkley was allegedly based. App. 7a.

As summarized by the Court of Appeal, the list of allegations now found by Hankla to be true included: "(1) that respondent exhibited a pattern of leadership/management which resulted in the destruction of morale in his command staff; (2) that respondent made disparaging remarks about Hankla regarding his continued employment of Officer J. Ponce, and accused Hankla of reducing Ponce's recommended discipline because of a family business relationship; (3) that respondent initiated and sustained sub-rosa investigations of elected City officials without notification to or authorization from Hankla; (4) that respondent conducted an investigation into the activities of the assistant city manager without authorization

by Hankla; (5) that respondent ordered staff not to communicate with the director of human resources regarding matters in which communication was necessary to ensure adherence to City policy; and (6) that, without authorization or notification to Hankla, respondent ordered a police helicopter to transport him to and from a social function while he was off duty." App. 7a-8a.

Mr. Hankla's letter advised Chief Binkley that at the administrative appeal hearing, he would "be given an opportunity to establish a formal record of the evidence which would either tend to show that the allegations are false or that mitigating circumstances should be taken into consideration." The letter further advised, Dr. Shoendorf would prepare a report to Hankla and that *Hankla was to retain "the final decision making authority pursuant to [his] responsibilities under the Charter."* App. 8a, emphasis added.

Chief Binkley's administrative appeal hearing was heard by Dr. Shoendorf on February 27, 1992. Only respondent testified at the hearing. App. 8a.

Chief Binkley objected to the limited scope of the hearing, and Mr. Hankla's retention of final decision making authority. Chief Binkley demanded, but was refused, the opportunity to cross-examine the individuals whose statements formed the evidentiary basis for Mr. Hankla's findings of misconduct. Chief Binkley further objected that he was being punished for appealing his discharge as evidence by the fact that Mr. Hankla found invocation of the right to appeal, but was forcing Chief Binkley to defend against the same charges of wrongdoing during the appeal hearing. App. 8a.

Dr. Schoendorf concluded that the decision to discharge Chief Binkley should be sustained based upon the "breach in morale," as well as "differences in leadership and management style."[1] App. 8a.

On March 2, 1992, Chief Binkley was advised by letter that Mr. Hankla had received and fully reviewed the report of Dr. Schoendorf, and that Mr. Hankla's decision to remove him from the position of chief of police, effective February 14, 1992 remained unchanged. App. 9a.

Chief Binkley then petitioned the Superior Court, State of California, County of Los Angeles, for a writ of mandate compelling the City of Long Beach to vacate its termination of Chief Binkley because of the inadequacy of the hearing he was afforded. The trial court rendered a judgment directing the issuance of such a writ of mandate. App. 9a. The City appealed and the Court of Appeal

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[1] "As contained in the Court of Appeal's opinion, the findings by Dr. Schoendorf provided: "On February 28, 1992, Dr. Schoendorf issued his written findings, in summary, as follows: (1) that respondent had done an excellent job as a 'Reform Chief' bringing major improvements to the police department, but his inability to change his management style to become less hierarchical had led to significant destruction of morale in the department; (2) that respondent did maintain sub-rosa investigations of elected city officials without notifying the city manager; (3) that respondent had problems dealing with certain City officers and should have discussed those problems with the city manager, rather than conveying concerns to command staff, who perceived that they were not to communicate with certain City departments and officials; and (4) that respondent's use of a police helicopter did not violate any rule or regulation, but was 'perhaps' not politically astute, without the city manager's authorization." App. 8a-9a.

reversed. App. 21a. Chief Binkley then unsuccessfully petitioned the California Supreme Court for review. App. 22a, 27a.

REASONS FOR GRANTING THE PETITION

WHEN A PROMINENT PUBLIC OFFICIAL IS TERMINATED IN SUCH A WAY THAT HIS REPUTATION IS TARNISHED AND HIS LIBERTY INTEREST IS IMPINGED UPON, DUE PROCESS REQUIRES THAT THE OFFICIAL BE AFFORDED A NAME-CLEARING HEARING IN WHICH HE HAS A RIGHT TO CONFRONT AND CROSS-EXAMINE HIS ACCUSERS AND WHICH IS PRESIDED OVER BY AN IMPARTIAL TRIBUNAL.

In *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L.Ed.2d 515, 91 S.Ct. 507 (1971), this court held that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Following *Wisconsin*, in *Board of Regents v. Roth*, 408 U.S. 564, 573, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972), the court reasoned that when a government employee is dismissed accompanied by a "charge against him that might seriously damage his standing and associations in his community" such a dismissal would constitute something "the government is doing to him" so as to trigger the due process right to a name-clearing hearing.

In the present case there is no dispute that the manner in which Chief Binkley was terminated as Chief of

Police of Long Beach harmed his reputation and implicated a liberty interest, entitling him to a name-clearing hearing. Chief Binkley was terminated as the Chief of Police under a cloud of highly publicized charges that severely eroded his standing in the community and certainly diminished his available career opportunities to the point where the well-paid head of a large metropolitan police force is reduced to a much lower paying security consultant job. As the Court of Appeal recognized, Chief Binkley was removed "from the position of chief of police based on charges of misconduct, mismanagement, and misjudgment. We must realistically assume that such allegations would have a tendency to stigmatize [Chief Binkley's] employment opportunities in law enforcement administration." App. 14a.[2] Thus there is no dispute that Chief Binkley was entitled to a name-clearing hearing. The only question involved was the nature of the hearing to which Chief Binkley was entitled.

This court has been reluctant to specify with precision the nature of the process to which an individual deprived of a liberty or property interest is entitled. See *Wolff v. McDonnell*, 418 U.S. 539, 557-58, 41 L.Ed.2d 935, 94 S.Ct. 2963 (1974) ("The Court has consistently held that some kind of hearing is required at some time before a

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[2] Because of the statutory procedures to which even an at-will peace officer is entitled under California law, Chief Binkley also had a property interest in his position. See *Bagett v. Gates* 32 Cal.3d 128, 135 [185 Cal.Rptr. 232, 649 P.2d 874]. While the analysis in this petition focuses on the process Chief Binkley was due because of the deprivation of his liberty interest, by no means is that focus intended to constitute a waiver of his claim that he was erroneously deprived of a property interest.

person is finally deprived of his property interest."); *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 6 L.Ed.2d 1230, 815 S.Ct. 1743 (1961) ("the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.")

In *Mathews v. Eldridge*, 424 U.S. 319, 334-335, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), this court crafted a generalized three part test for determining the nature of a hearing to which an individual is entitled under due process: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and, finally, the Government's interest, including the function involved and of the fiscal and administrative burdens that the additional or substitute procedural requirements would entail."

As now detailed, review of these considerations highlight why the process afforded Chief Binkley in this case was far from that which he was due – and why the time has come for this court to articulate more precise guidelines as to the minimum procedure to which an individual deprived of a liberty interest in this setting is entitled.

A. The Private Interest Affected

The liberty interests of an individual terminated from government employment is implicated only when that termination is based upon charges that will haunt the

employee and will diminish his or her ability to find suitable replacement employment. For this reason, the deprivation of a liberty interest under these circumstances is of equal significance to the deprivation of a property interest. Indeed, arguably an individual deprived of reputation and earning capacity loses much more by government action than if the government directly takes his or her property. Yet, despite the significance of the deprivation of a liberty interest under these circumstances, a number of lower courts (including the Court of Appeal in this case) treat the deprivation of a liberty interest with a yawn.

To justify this second class treatment these courts erroneously reason that because the "purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name' . . . ", *Arnett v. Kennedy*, 416 U.S. 134, 157, 40 L.Ed.2d 15, 94 S.Ct. 1633 (1974); *Codd v. Velger*, 429 U.S. 624, 628, 51 L.Ed.2d 92, 97 S.Ct. 882 (1977) (same), the only process a terminated party is due is the opportunity to state his or her case. See *Baden v. Koch*, 799 F.2d 825, 832-33 (2d Cir. 1986) (discharged Chief Medical Examiner whose liberty interest was only minimally impinged upon afforded all the process that was due by being given an opportunity to respond to the charges against him); *Chilingirian v. Boris*, 882 F.2d 200, 206 (6th Cir. 1989) ("a name-clearing hearing need only provide an opportunity to clear one's name and need not comply with formal procedures to be valid").

In other words, many (but certainly not all) courts are now equating spleen venting with a realistic opportunity at name clearing. As detailed below, such hearings

stripped of any true procedural safeguards are the equivalent of no hearing at all.

It is time for this court to articulate that careers and reputations are as important as the direct deprivation of salary or other similar property interests.

B. The Probable Value Of Additional Procedures

The second factor stated in *Mathews* for determining the nature of the hearing necessary to satisfy due process is "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." *Mathews v. Eldridge*, 424 U.S. at p. 335. In the present case, the "hearing" consisted solely of affording Chief Binkley the opportunity to tell his side of the story to an individual appointed by Chief Binkley's primary accuser who was presiding over the hearing with the knowledge that his decision would be subject to independent review by that accuser. Among other deficiencies, Chief Binkley was refused the opportunity to confront and cross-examine witnesses (or present any independent evidence).

As one leading commentary on evidence has explained: Cross examination "is beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 J. Wigmore, Evidence § 1367, at 32. This court has also recognized the significance of confrontation and cross-examination. For example, in *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970), this court

considered the process that was due before welfare benefits were terminated. The court explained that "the statutory 'fair hearing' [after termination] will provide the recipient with a full administrative review. [fn] Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payment in order to protect a recipient against an erroneous termination of his benefits." (*Id.* at pp. 266-67.)

Even though the pre-termination hearing in *Goldberg* had such a narrow purpose, this court nevertheless concluded that the procedures afforded by the state were inadequate, in part, because the state did not afford the recipient the right to confront and cross-examine adverse witnesses. In so holding the court explained: "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. [Citations.]" (*Id.* at p. 269.)

This court opined that what it had earlier said in *Greene v. McElroy*, 360 U.S. 474, 496-497, 3 L.Ed.2d 1377, 79 S.Ct. 1400 (1959) was "particularly pertinent here." (*Goldberg v. Kelly*, 397 U.S. at 270.) In *Greene*, this court had explained:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to proved the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

> While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative . . . actions were under scrutiny."

This court has found, however, that the right to cross-examination is not absolute. Rather, under limited circumstances the right to confront and cross-examine can be dispensed with. Thus, in *Wolff v. McDonnell*, 418 U.S. at 567, the court concluded that in a prison disciplinary hearing due process did not require confrontation and cross-examination of adverse witnesses because "there would be considerable potential for havoc inside the prison walls. Proceedings would inevitably be longer and tend to unmanageability. These procedures are essential in criminal trials where the accused, if found guilty, may be subject to the most serious deprivations, [citation], or where a person may lose his job in society, [citation]."[3]

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[3] In concluding that Chief Binkley was not entitled to cross-examine witnesses the Court of Appeal cited to the plurality *Mathews v. Eldridge*, 424 U.S. 319, 344, opinion. In *Mathews*, the court reasoned that prior to the termination of disability payments the recipient was not entitled to an oral evidentiary hearing because "the decision whether to discontinue benefits, will

Absent *compelling* reasons for dispensing with cross-examination (such as in *Wolff*), whenever the truth of allegations are in question then the right to cross-examine adverse witnesses should be preserved. In the setting of a name-clearing hearing, entitlement to the right to cross-examine should be particularly safeguarded. A terminated employee has a right to a name-clearing hearing *only* when he or she disputes the charges. *Codd v. Velger,* 429 U.S. at 628 (nontenured employee who is stigmatized by charges is entitled to a name-clearing hearing only when he challenges "the substantial truth of the material in question"); *White v. Thomas,* 660 F.2d 680, 684 (5th Cir. 1981), cert. den., 455 U.S. 1027 (1982) ("A constitutionally protected liberty interest is implicated only if an employee is discharged in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities.)

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turn, in most cases, upon 'routine standard and unbiased medical reports by physician specialists." Moreover, the court relied upon the fact that (1) the disability recipient was provided with information that "identifies with particularity the information relevant to the entitlement decision . . . " (*id.* at p. 345); (2) the disability recipient has full access to all information relied upon by the state agency (*id.* at p. 346); and (3) prior to termination the recipient is provided a summary of the relevant evidence and is afforded the opportunity to submit additional evidence or arguments "enabling him to challenge directly the accuracy of the information in his file as well as the agency's tentative conclusions." (*Id.* at. p. 346.) None of these safeguards are present here. Yet, the court cavalierly dispensed with the need for cross-examination.

Thus, when an individual is accused of wrongdoing and as a result has his or her career prospects and reputation diminished, then by definition the factual accuracy of the charges in question are in dispute. Accordingly, if the name-clearing hearing is to serve any purpose then that purpose must be to discover the truth – the very task for which cross-examination is uniquely suited.

Absent a right to confrontation and cross-examination, a name-clearing hearing is reduced to an empty ritual; not meaningful due process. Common experience teaches that a person charged with malfeasance or incompetency is expected to dispute those charges in an effort to save his or her job or to preserve his or her reputation – regardless of the truth of those allegations. Why should anyone believe an employee terminated for dishonesty simply because that employee says that he or she is honest? If the employee requests a name-clearing hearing what is he or she expected to say? The only true opportunity the accused employee has to actually clear his or her name is through penetrating questioning of his or her accusers.

Yet, despite the pivotal nature of confrontation and cross-examination in a name-clearing hearing, the lower courts are heavily divided as to whether accused employees are entitled to this fundamental right. A number of courts have recognized the significance cross-examination plays in a name-clearing hearing. *Walker v. United States*, 744 F.2d 67 (10th Cir. 1984) (probationary public employee terminated based upon charges that he lied on employment application denied due process by not being afforded opportunity to confront and cross-examine accusers.); *Orloff v. Clelan*, 708 F.2d 372, 379 (9th

Cir. 1983) (A terminated physician entitled to a name-clear hearing was not afforded due process, in part, because the physician was "not invited to submit evidence, even in the form of affidavits, on his behalf or to examine the evidence against him."); *Doe v. United States Dept. of Justice*, 753 F.2d 1092, 1113, fn. 27 (D.C. Cir. 1985) (court in remanding matter to the district court to shape the contours of the name-clearing hearing to which the terminated public employee was entitled refers the district court to other cases requiring the employee be afforded the right to confront and cross-examine witnesses); *Campbell v. Pierce County, Ga.*, 741 F.2d 1342, 1345 (11th Cir. 1984), cert. den., 470 U.S. 1052 (1985) ("While the features of such a [name-clearing] hearing have been prescribed with substantial flexibility, courts have required that the claimant have notice of the charges which have been raised against him, and an opportunity to refute by cross-examination or independent evidence, the allegations which gave rise to the reputational injury.")[4]

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[4] Other court's have concluded that an employee stigmatized by charges was not deprived of due process when he or she was given an opportunity to cross-examine adverse witnesses. See *Schleck v. Ramsey County*, 939 F.2d 638 (8th Cir. 1991) (Terminated employees were afforded truncated pretermination hearing and a fuller post-termination hearing where they were afforded the right to cross-examine adverse witnesses); *Spielman v. Hildebrand*, 873 F.2d 1377 (10th Cir. 1989) (hearing afforded to preadoptive parents prior to losing custody of child sufficient to satisfy due process when the parents had the right to cross-examine adverse witnesses); *Beitzell v. Jeffrey*, 643 F.2d 870 (1st Cir. 1981) (professor who was denied tenure was afforded due process where he had the opportunity to cross-examine adverse witnesses)

Yet other courts (such as the Court of Appeal in this case) have readily dispensed with the need for cross-examination in this setting. See *Boston v. Webb*, 783 F.2d 1163, 1167 (4th Cir. 1986) (terminated police officer did not have due process right to confront and cross-examine witnesses at name-clearing hearing); *Chilingirian v. Boris*, 882 F.2d at 205 (terminated city attorney not entitled to cross-examination at name-clearing hearing).

Significantly, the lower courts which conclude that a terminated employee has no due process right to cross-examine adverse witnesses, do not do so because of institutional considerations such as involved in *Wolff v. McDonnell*, 418 U.S. 539 (witness safety) or because there are other procedural safeguards which replicate cross-examination. *Mathews v. Eldridge*, 424 U.S. at 344. Rather, the deprivation of this cornerstone of due process can only be attributed to the low esteem in which these courts hold name-clearing hearings. Reading these opinions, one is left with the unswerving impression that name-clearing hearings are a necessary evil which are begrudgingly afforded to disgruntled employees only because this court has concluded that such hearings are constitutionally required. The danger of this attitude is well illustrated by the woefully inadequate procedures the Court of Appeal concluded satisfied due process in this case.

Chief Binkley was required to carry the burden of disproving the allegations against him and was further burdened with the need to convince a hearing officer appointed by the Chief's primary accuser who was presiding at the hearing with the knowledge that his decision could be overridden or disregarded by that very accuser. To say that going into the hearing the proverbial

deck was stacked against Chief Binkley is a tremendous understatement. If Chief Binkley was to have any chance whatsoever of clearing his name, it was through the opportunity to present independent evidence and to confront and question his accusers. But the city declined to afford even this minimal protection. Chief Binkley was relegated to having the opportunity of explaining why the charges against him were false to an agent of the very individual who made those charges in the first place. This was anything but due process.

C. The Government's Interest In A Truncated Procedure

The final consideration under *Mathews* for evaluating whether the hearing afforded the accused satisfies due process is the "Government's interest, including the function involved and of the fiscal and administrative burdens that the additional or substitute procedural requirements would entail." *Mathews v. Eldridge*, 424 U.S. at 335.

When an employee is terminated in such a manner that a liberty interest is implicated then, as detailed above, the function of cross-examination is uniquely geared to the very essence of a name-clearing hearing – to ascertain the truth of the allegations. The question thus becomes what administrative burden would justify dispensing with this key aspect of due process. The government's interest in truncated procedures in this setting is based upon the need for the government to act expeditiously once an employee is suspected of wrongdoing. See *Baden v. Koch*, 799 F.2d at 832-33 (court approves

informal process afforded terminated Chief Medical Examiner whose liberty interest was minimally impinged upon, in part, because of the City's interest "in the ability of its executive officer to respond promptly and effectively to complaints about a high level official who is serving at the executive's discretion.")

Obviously the more serious the charges against the employee the greater the need for prompt action. Not coincidentally, however, the graver the charges against the employee the greater the liberty interest and the greater the need for the employee to have a realistic opportunity to clear his name. A terminated employee charged with detestable acts who is not able to clear his name at the hearing provided has little hope of regaining his reputation or career standing.

However, as the present case reflects, the government's need for expeditious action and the employee's right to have a meaningful opportunity to clear his name could be accommodated in such a way as to afford the employee the right to confront and cross-examine his accusers. Here, Chief Binkley was suspended from acting as Police Chief at the time of his name-clearing hearing. Had he been afforded fuller and more meaningful process the City's interest would not have been impeded in the least. See *Doe v. United States Dept. of Justice*, 753 F.2d at 1114 ("the administrative burdens involved in a post-termination *Codd* hearing do not in any way interfere with the Department's *employment* decisions; the issue in the *Codd* hearing will be the veracity of the Department's charges, not the propriety of the discharge itself.") Thus,

this final factor militates in favor of affording Chief Binkley the critical right to confront and cross-examine his accusers.

The Court of Appeal in this case was clearly erroneous in concluding to the contrary. The erroneous nature of the court's ruling had a particularly pernicious effect on Chief Binkley since as a result of that decision the District Court, in Chief Binkley's independent action for damages against respondents, concluded that Chief Binkley's federal claims under 42 U.S.C. § 1983 were barred by res judicata due to the disposition of this action and remanded the matter to state court for disposition of Chief Binkley's state law claims for damages. Thus, at this point the erroneous analysis employed by the Court of Appeal has stripped Chief Binkley of more than his right to a fair hearing. It has greatly impinged upon Chief Binkley's right to recover damages due to this deprivation.

In sum, review by this Court is needed to craft guidelines to protect the due process rights of the numerous public employees now being deprived of their right to a meaningful name-clearing hearing by courts which are employing the same skewed analysis used by the Court of Appeal in this case.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND AFFILIATE DISTRICT DIVISION TWO

LAWRENCE L. BINKLEY, Petitioner and Respondent, v. CITY OF LONG BEACH et al., Respondents and Appellants.	No. B 069234 (Super.Ct.No. B5 016781) (Filed Jul. 8, 1993)

APPEAL from orders of the Superior Court of Los Angeles County. *Robert M. O'Brien*, Judge. Reversed.

John R. Calhoun, City Attorney, and Robert E. Shannon, Assistant City Attorney, for Respondents and Appellants.

Franscell, Strickland, Robert & Lawrence, Carol D. Janssen and Rodell R. Fick, for Petitioner and Respondent.

Appellants, the City of Long Beach (hereafter the City), and James C. Hankla, city manager of the City of Long Beach (hereafter Hankla), appeal from the judgment of the superior court granting a peremptory writ of mandamus in favor of respondent, Lawrence L. Binkley, the embattled chief of police for the City of Long Beach. The writ set aside appellants' directive of March 2, 1992, confirming an earlier decision by Hankla to remove Binkley from the position of chief of police effective February

14, 1992, and ordered appellants to grant respondent a new administrative appeal hearing in compliance with the Public Safety Officers Procedural Bill of Rights Act (hereafter the Act). (Gov. Code, § 3300 et seq.)[1] The writ further prohibited Hankla from exercising any review authority over the administrative appeal hearing officer's decision or findings of fact. Appellants contend that the administrative appeal process afforded to respondent, an at will employee serving at the pleasure of the city manager, fully complied with the requirements of the Act. We agree and reverse the judgment.

The Facts

The City is a charter city, governed by the "home rule" provisions of article XI, section 5 of the California Constitution.[2] Under the City's charter, the city manager

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[1] All statutory references are to the Government Code unless otherwise indicated.

[2] Article XI, section 5 of the California Constitution provides: "(a) It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith. [¶] (b) It shall be competent in all city charters to provide, in addition to those provisions allowable by this Constitution, and by the laws of the State for: (1) the constitution, regulation, and government of the city police force (2) subgovernment in all or part of a city (3) conduct of city elections and (4) plenary authority is hereby granted, subject only to the restrictions of

is charged with the responsibility for the administration of most of the City's departments, including the police department. (Long Beach City Charter, art. III, § 300.)[3] The city manager's powers and duties include the appointment, suspension and removal of all City employees in the unclassified service. (Long Beach City Charter, art. III, § 301.) Department heads, including the chief of police, are members of the unclassified service and serve as the pleasure of the city manager. (Long Beach City Charter, art. XI, § 1102, subd. (a)(5).)

In March 1987, respondent was hired as the chief of police for the city. He was given the task of reforming and restoring public confidence in the City's police department, which had acquired a reputation for providing inadequate training, and exercising insufficient control and discipline over its officers.

In early October 1991, during two city council meetings at which law enforcement-related actions were

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this article, to provide therein or by amendment thereto, the manner in which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be elected or appointed, and for their removal, and for their compensation, and for the number of deputies, clerks and other employees that each shall have, and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

[3] Under the Long Beach City Charter, the city manager is responsible for the administration of all departments except the city attorney, city auditor, city prosecutor, civil service department, legislative department, harbor department and water department. (Long Beach City Charter, art. III, § 300.)

taken, Long Beach City Attorney John Calhoun reportedly made statements to Deputy Police Chief Robert M. Luman, threatening to "have [respondent's] job," in part, because respondent had not spoken with City Attorney Calhoun for more than 10 months. When respondent heard about the threat, he attempted to set up a meeting with Calhoun to discuss the matter but was allegedly informed by the assistant city attorney, Robert Shannon, that it would be "fruitless" to meet with Calhoun at that time.[4]

On December 19, 1991, Hankla invited respondent to his office and asked him to announce his retirement, effective March 1992. Respondent was told that his departure was sought because of complaints by a number of police department commanders about the "element of fear" in respondent's operation of the department.

On December 23, 1991, Hankla personally delivered to respondent a letter stating that recent events had "caused [him] to undertake a full review of [respondent's] performance as Chief of Police." The letter advised respondent that, effective immediately, he was temporarily reassigned from his current position "to a special assignment under [Hankla's] direction at a location to be determined." The letter further stated that

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[4] Respondent asserts that on October 10, 1991, he broached the subject of Calhoun's remarks with Hankla. Hankla purportedly assured respondent that he had already talked to Calhoun, who was having problems with several City staff members, and had advised him that the "stupid" statements should not have been made.

"Deputy Chief Ellis will serve as Acting Chief of Police" during the investigation.

On January 10, 1992, Assistant City Attorney Shannon confirmed and advised respondent's attorney of a meeting with Hankla scheduled for Monday, January 13, 1992, in the Docent's Library at Rancho Los Alamitos. The letter stated, in relevant part: "This meeting is *not* a Skelly hearing, nor is the Chief entitled to such a hearing. However, he will be given an opportunity to respond to the allegations set forth in the attached document. As we have previously indicated, the investigation of these allegations forms a part of the total performance review of your client. Chief Binkley will further have an opportunity to discuss the more general allegations that his management policies and practices have contributed to the destruction of morale in the Police Department in general and his Command staff in particular."

Attached to the January 10th letter was a list of specific allegations of misconduct by respondent, as follows:

(1) Initiation of sub rosa investigations on an elected Long Beach public official without authorization or notification to the city manager;

(2) Unauthorized hiring of and payment to retired police officers as undercover agents to investigate a Long Beach public official;

(3) Encouragement of command officers to file stress-related pension claims;

(4) Accusing the city manager of wrongful action in a personnel matter, i.e., that he reduced the proposed

discipline of Officer J. Ponce because of a personal/business relationship, and making disparaging statements regarding the city manager's continued employment of Officer Ponce;

(5) Directing subordinates not to communicate with the director of human resources in a matter in which such communication was necessary to ensure adherence to City policy;

(6) Directing subordinates not to seek the advice of the city attorney, or to ignore advice after it was given, regarding matters in which adherence to the legal advice of that office was necessary and appropriate;

(7) Unauthorized use of a police helicopter to transport respondent to a social function while he was off duty.

On January 13, 1992, respondent and his attorney met with Hankla, Assistant City Attorney Shannon, and an investigator. Respondent was questioned and gave statements in response to the list of allegations of misconduct.

On January 17, 1992, respondent was informed in writing that following a full review of respondent's performance as chief of police, Hankla was "satisfied that there is not sufficient evidence to conclude that you have engaged in any act of wrongdoing." The letter further stated: "However, I have, in the course of this review, discovered instances in which you have exercised questionable judgment. Further, a substantial number of your command staff have come forward to criticize your leadership, and you have, by your actions, subjected yourself to criticism from City management. As a consequence, I

have lost confidence in your ability to lead the Long Beach Police Department. I am, therefore, removing you from the position of Chief of Police."

The letter advised that, because of respondent's significant past accomplishments, he would be permitted to remain on special assignment until February 14, 1992, during which time he would continue to receive full pay and benefits, including use of his City vehicle.

On February 14, 1992, Hankla sent a letter acknowledging respondent's readiness to proceed with an appeal hearing. The letter identified Dr. Judson Schoendorf as the person selected by Hankla to conduct the scheduled appeal hearing, and included a summary of the six findings, and the supporting evidence upon which Hankla's decision to remove respondent was based. The list of allegations found by Hankla to be true included: (1) that respondent exhibited a pattern of leadership/management which resulted in the destruction of morale in his command staff; (2) that respondent made disparaging remarks about Hankla regarding his continued employment of Officer J. Ponce, and accused Hankla of reducing Ponce's recommended discipline because of a family business relationship; (3) that respondent initiated and sustained sub rosa investigations of elected City officials without notification to or authorization from Hankla; (4) that respondent conducted an investigation into the activities of the assistant city manager without authorization by Hankla; (5) that respondent ordered staff not to communicate with the director of human resources regarding matters in which communication was necessary to ensure adherence to City policy; and (6) that, without authorization or notification to Hankla, respondent ordered a

police helicopter to transport him to and from a social function while he was off duty.

The letter advised respondent that, at the administrative appeal hearing, he would "be given an opportunity to establish a formal record of the evidence which would either tend to show that the allegations are false or that mitigating circumstances should be taken into consideration." Thereafter, the letter advised, Dr. Schoendorf would direct a report to Hankla advising him of his factual findings. However, Hankla was to retain "the final decision making authority pursuant to [his] responsibilities under the Charter."

Respondent's administrative appeal hearing was heard by Dr. Schoendorf on February 27, 1992. Only respondent testified at the hearing.

Respondent objected to the limited scope of the hearing, and Hankla's retention of final decision making authority, as outlined in Hankla's letter of February 14, 1992. He demanded, but was refused the opportunity to cross-examine the individuals whose statements formed the evidentiary basis for Hankla's findings of misconduct. Respondent further objected that he was being punished for appealing his discharge as evidenced by the fact that Hankla found insufficient evidence of wrongdoing prior to respondent's invocation of the right to appeal, but was forcing respondent to defend against the same charges of wrongdoing during the appeal hearing.

On February 28, 1992, Dr. Schoendorf issued his written findings, in summary, as follows: (1) that respondent had done an excellent job as a "Reform Chief" bringing major improvements to the police department, but his

inability to change his management style to become less hierarchical had led to significant destruction of morale in the department; (2) that respondent did maintain sub rosa investigations of elected City officials without notifying the city manager; (3) that respondent had problems dealing with certain City officers and should have discussed those problems with the city manager, rather than conveying concerns to command staff, who perceived that they were not to communicate with certain City departments and officials; and (4) that respondent's use of a police helicopter did not violate any rule or regulation, but was "perhaps" not politically astute, without the city manager's authorization. Dr. Schoendorf concluded that the decision to discharge respondent should be sustained based upon the "breach in morale," as well as "differences in leadership and management style."

On March 2, 1992, respondent was advised by letter that Hankla had received and fully reviewed the report of Dr. Schoendorf, and that Hankla's decision to remove him from the position of chief of police, effective February 14, 1992, remained unchanged.

Respondent filed a petition for writ of administrative mandamus seeking orders, inter alia, setting aside Hankla's March 2, 1992, directive, and compelling a new administrative appeal hearing before an independent hearing officer. Following a hearing on June 30, 1992, the superior court found that appellants had failed "[i]n every respect" to comply with the Act (§ 3300 et seq.) and granted the writ.

Discussion

As the title suggests, the Public Safety Officers Procedural Bill of Rights Act provides a catalogue of basic rights and protections which must be afforded all peace officers by the public entities which employ them. (*Baggett v. Gates* (1982) 32 Cal.3d 128, 135 [185 Cal.Rptr. 232, 649 P.2d 874] [*Baggett*].)[5] The Act bespeaks the Legislature's determination that, because labor unrest and strikes produce consequences extending far beyond local boundaries, the maintenance of stable employment relations between peace officers and their employers is a matter of statewide concern. (§ 3301; *Burden v. Snowden* (1992) 2 Cal.4th 556, 567 [7 Cal.Rptr.2d 531, 828 P.2d 672] [*Burden*]; *Baggett, supra,* at pp. 136-139.)

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[5] In summary, the Act: (1) secures to public safety officers the right to engage in political activity, when off duty and out of uniform, and to seek election to or serve as a member of the governing board of a school district (§ 3302); (2) prescribes certain protections which must be afforded officers during interrogations which could lead to punitive action (§ 3303); (3) gives the right to review and respond in writing to adverse comments entered in an officer's personnel file (§§ 3305, 3306); (4) provides that officers may not be compelled to submit to polygraph examinations (§ 3307); (5) prohibits searches of officers' personal storage spaces or lockers except under specified circumstances (§ 3309); (6) limits the circumstances under which officers may be forced to disclose their personal financial circumstances (§ 3308); (7) gives officers the right to administrative appeal when any punitive action is taken against them, or they are denied promotion on grounds other than merit (§ 3304); and (8) protects officers against retaliation for the exercise of any right conferred by the Act (§ 3302), (32 Cal.3d at p. 135; *Gray v. City of Gustine* (1990) 224 Cal.App.3d 621, 625-626 [273 Cal.Reptr. 730] [*Gray*].)

In *Baggett, supra,* 32 Cal.3d 128, the Supreme Court considered whether the application of the Act of charter cities violated the "home rule" provisions of the California Constitution (Cal. Const., art. XI, § 5). The high court concluded that the Act's minimal infringement of the city's implied power to determine the manner in which its employees could be removed was not unconstitutional. (*Baggett, supra,* at pp. 138-140.)

Later, in *Gray, supra,* 224 Cal.App.3d 621, the Court of Appeal squarely addressed the applicability of the Act to a city police chief serving at the pleasure of a city manager. The appellate court held that police chiefs were "public safety officers" entitled to administrative appeal under section 3304, subdivision (b) of the Act.

In the instant matter, respondent was granted an administrative appeal hearing, but the superior court found that the hearing was inadequate to comply with section 3304 of the Act. Section 3304 provides, in relevant part, that: "(a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure. . . . [¶] (b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

Not only do appellants contend that the administrative appeal fully complied with section 3304 of the Act,

they further assert that the superior court's order, prohibiting Hankla from exercising any review authority over the administrative appeal hearing officer's decision or findings of fact, violates the "home rule" provision of the California Constitution (Cal. Const., art. XI, § 5) by abrogating the city manager's authority under the City's Charter, to appoint, suspend and remove, at will, his department heads, including the police chief. (3) In determining the scope of coverage under the Act, we independently determine the proper interpretation of the statute and are not bound by the lower court's interpretation. (*Burden, supra,* 2 Cal.4th at p. 562.)

At the outset we note that the Act was not intended to interfere with a charter city's right to regulate peace officers' qualifications for employment, or the causes for which they may be removed. (*Baggett, supra,* 32 Cal.3d at p. 138.) Nor was the Act intended to abrogate the powers granted charter cities by article XI, section 5 of the California Constitution (*Holcomb v. City of Los Angeles* (1989) 210 Cal.App.3d 1560, 1568 [259 Cal.Rptr. 1]), including the right to terminate a peace officer's employment at will, without a showing of "just cause." (*Browning v. Block* (1985) 175 Cal.App.3d 423, 430 [220 Cal.Rptr. 763] [*Browning*]; *Barnes v. Personnel Department* (1978) 87 Cal.App.3d 502, 506 [151 Cal.Rptr. 94] [*Barnes*].) The limited purpose of an administrative appeal under section 3304 is to give the peace officer subjected to punitive action an opportunity "to establish a formal record of the circumstance surrounding his termination" (*Id.* at p. 506) and "to attempt to convince the employing agency to reverse its decision, either by demonstrating the falsity of charges

which led to punitive action, or through proof of mitigating circumstances." (*Browning, supra,* at p. 430.)

Section 3304 requires only that an *opportunity* for administrative appeal be provided. It does not specify how the appeal process is to be implemented. (*Browning, supra,* 175 Cal.App.3d at p. 429). The details of administrative appeal under section 3304, subdivision (b) are left to be formulated by the local agency. (*Stanton v. City of West Sacramento* (1991) 226 Cal.App.3d 1438, 1443 [277 Cal.Rptr. 478].) Where, as here, the terminated employee serves at the pleasure of a city manager, and the scope of administrative appeal hearing is not prescribed by personnel rules, agency regulations, memoranda of understanding, or customary agency practices, the adequacy of the appeal procedure afforded must be measured according to constitutional due process principles. (*Gray, supra,* 224 Cal.App.3d at pp. 628-632.)

Decisions of the United States Supreme Court underscore the fact that due process is flexible and calls for such procedural protections as a particular situation demands. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334 [47 L.Ed.2d 18, 32-33, 96 S.Ct. 893].) Three distinct factors must be considered: the private interest that will be affected by the official action; the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional procedural safeguards; and the government's interest, including the function involved and the fiscal and administrative burdens entailed by imposing additional procedural requirements. (*Id.* at pp. 334-335 [33 L.Ed.2d at pp. 32-34].)

Respondent's right to a hearing arises because his removal from the position of chief of police was initiated based on charges of misconduct, mismanagement, and misjudgment. We must realistically assume that such allegations would have a tendency to stigmatize respondent's reputation and impair his ability to take advantage of other employment opportunities in law enforcement administration. (*Murden v. County of Sacramento* (1984) 160 Cal.App.3d 302, 308-309 [206 Cal.Rptr. 699] [*Murden*]; *Lubey v. City and County of San Francisco* (1979) 98 Cal.App.3d 340, 347 [159 Cal.Rptr. 440].) Because a protected "liberty" interest is implicated, due process requires, at minimum, that he be given an opportunity to refute the charges and clear his name. (*Gray, supra,* 224 Cal.App.3d at p. 629; *Murden, supra,* 160 Cal.App.3d at p. 309; see also *Codd v. Velger* (1977) 429 U.S. 624, 627 [51 L.Ed.2d 92, 96-97, 97 S.Ct. 882]; *Board of Regents v. Roth* (1972) 408 U.S. 564, 573, fn. 12 [33 L.Ed.2d 548, 558-559, 92 S.Ct. 2701] [*Board of Regents*].)

Appellants, of course, contend that the requirements of due process as well as section 3304 were satisfied by the pre- and post-termination name-clearing hearings afforded, and that the trial court's contrary finding stems from an unnecessarily expansive interpretation of the rights conferred by the Act. Respondent, on the other hand, seeks to demonstrate the constitutional inadequacy of the procedures employed.

Among other alleged defects in the appeal procedure, respondent points to the fact that he was relieved of the duties of his office, placed on temporary, nonexistent

assignment, and replaced by an acting police chief, without a *Skelly*-type pretermination hearing.[6] However, the Supreme Court of this state has held that *Skelly* procedural rights are inapplicable to government employees holding "at will" administrative positions, who have no constitutionally protected property interest in continued employment. (*Barthuli v. Board of Trustees* (1977) 19 Cal.3d 717, 722-723 [139 Cal.Rptr. 627, 566 P.2d 261]; *Board of Regents, supra,* 408 U.S. at pp. 576-577 [33 L.Ed.2d at pp. 560-561].) The United States Supreme Court is in accord. When the sole purpose of an administrative appeal procedure is to afford a discharged government employee an opportunity to clear his name, a hearing "after the actual dismissal is a sufficient compliance with the requirements with the Due Process Clause." (*Arnett v. Kennedy* (1974) 416 U.S. 134, 157 [40 L.Ed.2d 15, 35, 94 S.Ct. 1633]; see also *Murden, supra,* 160 Cal.App.3d at p. 310.)

Even were we to assume respondent was entitled to "some kind of a hearing" before being deprived of a "protected interest" (*Board of Regents, supra,* 408 U.S. at p. 570, fn. 7 [33 L.Ed.2d at pp. 556-557]), no deprivation of a constitutionally protected "liberty" interest occurred until the stigmatizing allegations of mismanagement and misconduct led to the decision to terminate his employment. (*Codd v. Velger, surpa,* 429 U.S. at p. 628 [51 L.Ed.2d at p. 97]; *Paul v. Davis* (1976) 424 U.S. 693, 706 [47 L.Ed.2d 405, 416-417, 96 S.Ct. 1155].) Respondent continued to receive full pay and benefits of the office of chief of police during the pendency of the city manager's investigation. He

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[6] See *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194 [124 Cal.Rptr. 14, 539 P.2d 774] (*Skelly*).

received notice of the charges under investigation and an opportunity to respond to the decisionmaking authority, in person, before the effective date of termination, February 14, 1992. Therefore, a *Skelly*-type pretermination hearing was in fact held, whether or not required. (*Murden, supra,* 160 Cal.App.3d at pp. 309-310; *Skelly, supra,* 15 Cal.3d at p. 215; see also *Board of Regents, supra,* 408 U.S. at p. 570, fn. 7 [33 L.Ed.2d at pp. 556-557].)

Respondent maintains that he was denied due process, and the trial court so found, because he was denied the right to cross-examine his accusers, and forced to assume the burden of disproving the "spurious" allegations against him at the administrative appeal hearing. As evidence of the latter charge, he points to Hankla's letter of February 14, 1992, which purportedly places the burden on respondent "to establish a formal record of the circumstances surrounding [his] termination and to produce evidence which would either tend to show that the allegations are false or that mitigating circumstances should be taken into consideration."

Respondent cites *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99 [179 Cal.Rptr. 351] in support of the proposition that he was improperly forced to carry the burden of proof and the burden of producing evidence, and denied cross-examination rights. The case is inapposite. In *Parker,* the defendant city dismissed a rank and file police sergeant – "a 'tenured' employee who could be removed from his position only for cause." (*Id.* at p. 106.) The applicable administrative appeal rules expressly provided a right of cross-examination, but placed the burden of proof on the party seeking to appeal the decision of the department head, and, the plaintiff

was compelled to present evidence sufficient to disprove the charges before the city was required to present any evidence at the administrative appeal hearing.

By contrast, respondent held the position of police chief at the pleasure of the city manager. The city manager was free to discharge him without "just cause," so long as he was given an adequate opportunity to "convince the employing agency to reverse its decision." (*Browning, supra,* 175 Cal.App.3d at p. 430; *Board of Regents, supra,* 408 U.S. at p. 573, fn. 12 [33 L.Ed.2d at pp. 558-559].) Accordingly, Hankla's February 14th letter did not improperly shift the burden of proof to respondent. Rather, it accurately apprised respondent of his limited right, as a public employee serving at the pleasure of the city manager, to a hearing to "establish a formal record of the circumstance surrounding his termination" (*Barnes, supra,* 87 Cal.App.3d at p. 506) and "to convince the employing agency to reverse its decision, either by demonstrating the falsity of charges which led to punitive action, or through proof of mitigating circumstances." (*Browning, supra,* at p. 430.)

Respondent has failed to cite a single case which supports his claim that due process mandates that he be given an opportunity to confront and cross-examine the witnesses at a trial-type, evidentiary hearing. Neither *Gray* nor *Browning* nor *Lubey* – which discuss the right to administrative appeal in the context of peace officers serving in various "at will" positions – states or implies that such officers have the right of confrontation guaranteed by the Act or the due process clause. There is, however, authority supporting the position taken by appellants, that there is no right of cross-examination at a

name-clearing hearing. (*Murden, supra,* 160 Cal.App.3d at p. 311; *Mathews v. Eldridge, supra,* 424 U.S. at p. 348 [47 L.Ed.2d at p. 41].)

Respondent also defends the trial court's ruling on the ground that the appeal process was biased. As indicia of the biased nature of the procedure, he points to the fact that the hearing examiner was appointed by the city manager, received advice from the city attorney, and his decision on appeal could be disregarded or overridden by the city manager, who retained ultimate power. Once again, the cases cited by respondent are readily distinguishable.

In *Gray, supra,* for example, the administrative appeal hearing was held before the city manager who discharged the chief of police. According to the appeal procedure offered, the city manager was to hear the chief's evidence, and make a recommendation to the city council regarding his continued employment. (224 Cal.App.3d at p. 631.) The police chief refused to submit to the procedure. The Court of appeal found that the administrative appeal offered was clearly inadequate because the city manager was "embroiled in the controversy" and did not constitute a neutral fact finder. (*Ibid.*)

In this case, respondent was afforded a fact-finding hearing before a professional hearing examiner. He initially questioned the neutrality of Dr. Schoendorf, because he was selected by the city manager, but received assurances that the hearing examiner had little personal knowledge of and had not prejudged the case, and had been chosen solely because of his experience performing civil service commission hearings once per week for a

period of eight years. When respondent's counsel expressed concern that Assistant City Attorney Shannon appeared to be giving Dr. Schoendorf advice, he was assured that Shannon's role was that of counsel for the city manager, and that Dr. Schoendorf would be determining what course of action to take from the evidence. At the conclusion of the hearing, respondent's counsel commented favorably on the fair manner in which the administrative appeal hearing had been conducted.

As the Court of Appeal stated in *Gray, supra:* "Bias and prejudice are not implied and must be clearly established. A party's unilateral perception of bias cannot alone serve as a basis for disqualification. Prejudice must be shown against a particular party and it must be significant enough to impair the adjudicator's impartiality. The challenge to the fairness of the adjudicator must set forth concrete facts demonstrating bias or prejudice." (224 Cal.App.3d at p. 632.)

No facts appear in the instant record supporting a claim that the respondent's administrative appeal hearing officer was biased. There is nothing to indicate that Dr. Schoendorf had a personal or financial stake in the matter, or that he harbored any animosity toward respondent. (*Murden, supra,* 160 Cal.App.3d at p. 312.) Evidence is also lacking that respondent's hearing examiner was one of a "seamless web of officials out to get him." (*Doyle v. City of Chino* (1981) 117 Cal.App.3d 673, 682 [172 Cal.Rptr. 844].) Respondent was not precluded from conducting his own investigation and, at the hearing, he was given ample opportunity to present his own evidence. Accordingly, Dr. Schoendorf is entitled to the benefit of the presumption that he was a person " 'of conscience

and intellectual discipline' " and judged respondent's case fairly based on the evidence. (*Withrow v. Larkin* (1975) 421 U.S. 35, 55 [43 L.Ed.2d 712, 728, 95 S.Ct. 1456].)

We also reject the assertion that due process was offended by the city manager's retention of final decisionmaking authority under the city charter. It has been held that "the right to a fair and impartial tribunal is not violated by permitting the official who makes the initial disciplinary decision to have the final say in the matter." (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 579 [257 Cal.Rptr. 427].) Likewise, the United States Supreme Court has declared: "Once a person has cleared his name at a hearing, his employer, of course, may remain free to deny him future employment for other reasons." (*Board of Regents, supra,* 408 U.S. at p. 573, fn. 12 [33 L.Ed.2d at pp. 558-559].) In any event, Dr. Schoendorf *sustained* the decision of the city manager, making it unnecessary for him to disregard or override the decision rendered on appeal.

Respondent further argues that the procedure was biased by virtue of the fact that the city manager and city attorney participated in the pretermination investigation. The combination of adjudicative and investigative functions, without more, does not offend due process. (*Withrow v. Larkin, supra,* 421 U.S. at p. 47 [43 L.Ed.2d at pp. 723-724].)

We are persuaded that the trial court's construction of section 3304 of the Act unnecessarily eviscerates the city manager's charter-endowed power to appoint, suspend, and remove, without cause, his department heads (Long Beach City Charter, art. III, § 301, art. XI, § 1102,

subd. (a)(5)). Accordingly, we agree with appellants that the trial court's order, prohibiting Hankla from retaining "final decision making authority" under the City's Charter resulted in a violation of the "home rule" provisions of our state Constitution (Cal. Const., art. XI, § 5). The statewide interest in the maintenance of stable relations between public safety officers and their employers was adequately served by granting respondent notice of the charges, an opportunity to respond to the city manager's charges, and a post-termination hearing to clear his name, before a neutral fact finder. (*Baggett, supra,* 32 Cal.3d at pp. 136-138.)

Accordingly, the orders under review are reversed. Parties are to hear their own costs on appeal.

Fukuto, J.

Boren, P. J., and Gates, J., concurred.

B069234

IN THE
Supreme Court
OF THE STATE OF CALIFORNIA

LAWRENCE L. BINKLEY,
Petitioner and Respondent,

vs.

CITY OF LONG BEACH, et al.,
Respondents and Appellants.

PETITION FOR REVIEW

AFTER A DECISION BY THE COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION TWO

CAROL D. JANSSEN (State Bar No. 156152)
RODELL R. FICK (State Bar No. 127961)

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ISSUES PRESENTED

1. Whether a police chief's due process rights guaranteed to him under the Public Safety Officer's Procedural Bill of Rights Act codified in *Government Code* § 3300 et seq. include the right to a fair and impartial administrative appeal process, and not just a fair

appeal hearing. If so, whether, after *Baggett v. Gates*, 32 Cal.3d 128 (1982), this right under the Act is a matter of statewide concern such that the "home rule" provisions of the California Constitution are not violated by preventing a city manager, personally embroiled in the controversy, from exercising his authority pursuant to the City Charter to retain the final decision-making authority after an appeal hearing over the decision to terminate a police chief's employment.

2. Whether a police chief's right to a fair and impartial administrative hearing is violated by the City's failure to permit confrontation and cross-examination of adverse witnesses and its failure to provide him with a pre-disciplinary hearing pursuant to *Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975).

* * *

II. CHIEF BINKLEY'S DUE PROCESS RIGHTS WERE VIOLATED BY THE DENIAL OF HIS RIGHT TO CONFRONT HIS ACCUSERS AND HIS RIGHT TO A PRE-DISCIPLINARY HEARING.

Chief Binkley was entitled to certain procedural protections both before and after his termination under the circumstances of this case.

> A public employee's right to a hearing may arise where a termination or demotion is based on charges of misconduct which cause stigma to one's reputation or which impair one's ability to earn a living. Deprivation of a liberty interest entitles the employee to an opportunity to refute the charge and to clear his or her name. The right to a hearing under such circumstances is a

> remedy mandated by the due process clause of the Fourteenth Amendment.

Gray v. City of Gustine, 224 Cal.App.3d 621, 629 (1990) [internal citations omitted]. The Court of Appeal properly acknowledged that the "allegations would have a tendency to stigmatize [Binkley's] reputation and impair his ability to take advantage of other employment opportunities in law enforcement administration." (slip op. p.15). For that very reason, Chief Binkley should have had the opportunity to confront his accusers.

"In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly,.supra*, 397 U.S. at 269. The right to a fair trial includes the right to confront and cross-examine accusers. *Cason v. Glass Bottle Blowers Assn.*, 37 Cal.2d 134, 144 (1951). Fair procedure mandates the opportunity to confront accusers. *Hackenthal v. California Medical Assn.*, 138 Cal.App.3d 435, 442 (1982) (physician expelled from medical association entitled to fair procedure to include the right of cross-examination prior to expulsion).

Even a probationary (or at-will) employee has the right to establish a formal record of the circumstances surrounding his termination. *Barnes v. Personnel Department*, 87 Cal.App.3d 502, 506 (1978). Due process requires the party have "an opportunity to refute, test and explain," the evidence against him. *Vollstedt, supra*, 220 Cal.App.3d at 275 (court acknowledged that petitioner had the opportunity to confront and cross-examine witnesses but remanded to the agency for an independent

review because it failed to meet other procedural requirements). The denial of the Chief's right to confront and cross-examine his accusers was the subject of several objections by Binkley's counsel at the appeal hearing.

Similarly, due process includes *pre-termination* protections such as a *Skelly* hearing. *Skelly v. State Personnel Board*, 15 Cal.3d 194 (1975). If a probationary employee's termination or dismissal "is based on charges of misconduct which stigmatize his reputation, or seriously impair his opportunity to earn a living, or which might seriously damage his standing or associations in his community," the employee is entitled to due process under the Fourteenth Amendment. *Lubey v. City and County of San Francisco*, 98 Cal.App.3d 340, 346 (1979) [internal citations and quotations omitted].

"Probationary employees are not without *Skelly* rights when the alleged basis for job termination is based on charges of misconduct which stigmatize one's reputation or opportunity to earn a living." *Doyle v. City of Chino*, 117 Cal.App.3d 673, 676, n.1 (1981) (court stated that the employee's dismissal would stigmatize his professional reputation because the circumstances involved his on-the-job performance). In violation of his rights, Chief Binkley was never given a *Skelly* hearing.

The Court of appeal's statement that Chief Binkley received a "*Skelly*-type" pre-termination hearing cannot withstand scrutiny. (slip op. p.14). Chief Binkley was subject to discipline, suspension of his employment, in December of 1991 prior to the purported "*Skelly*-type" hearing in January, 1992. Second, the hearing did not comport with the requirements under *Skelly*. Although

the court of appeal's decisions set forth above support *Skelly* rights and confrontation rights of at-will or probationary peace officers, this Court has not yet addressed these important issues.

REQUEST FOR DEPUBLICATION

In the alternative, Petitioner, Lawrence L. Binkley, respectfully requests this Court order depublication of the opinion of the Court of Appeal in this matter based on this Court's authority pursuant to the California Constitution, Article VI, § 14 and the *California Rules of Court*, Rule 976(c)(2).

Although the Court of Appeals' decision "involves a legal issue of continuing public interest", *California Rules of Court*, Rule 976(b)(3), which permits publication of the opinion, publication will lead to harm to the public safety. As noted above, the purpose behind the Public Safety Officer's Procedural Bill of Rights Act is to promote stable employment relationships between peace officers and their employers to protect the public good.

> The consequences of a breakdown in such relations are not confined to a city's borders. These employees provide an essential service. Its absence would create
>
> * * *

Second Appellate District, Division Two, No. 8069234
S034507

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

LAWRENCE L. BINKLEY,
Respondent

v.

CITY OF LONG BEACH,
Appellant

SUPREME COURT
FILED
OCT 21 1993
Robert Wandruff Clerk
RW
DEPUTY

Petition for review DENIED.

/s/ Lucas
Chief Justice